

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

**DAKOTA TERRITORY TOURS, A.C.C., and
SOLID EDGE AVIATION, LLC,**

APPELLEES,

V.

**YAVAPAI COUNTY, ARIZONA AND
SEDONA –OAK CREEK AIRPORT
AUTHORITY,**

APPELLANTS.



FAA Docket No. 16-17-18

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on an appeal filed by Yavapai County, Arizona, owner and sponsor of the Sedona-Oak Creek Airport (Airport), and the Sedona Oak Creek Airport Authority (County/Appellants).¹ The County challenges the findings of the Director's Determination. [FAA Exhibit 2, Item 2].

On July 29, 2021, the Director found that the County violated Grant Assurance 22, *Economic Nondiscrimination* by failing to reasonably accommodate Complainants Dakota Territory Tours, A.C.C. and Solid Edge Aviation, LLC. (Dakota/Complainants) at Airport. The Director also found that the County effectively granted an exclusive right in violation of Grant Assurance 23, *Exclusive Rights* and the covenants under the two Deeds of Conveyance executed under Section 16 of the Federal Airport Act. Finally, the Director determined that by allowing the Authority to take the actions it took, Yavapai County also is in violation of Grant Assurance 5, *Preserving Rights and Powers*. [FAA Exhibit 2, Item 1, p. 16].

The County appeals the Director's Determination (DD) on several grounds. The County states the decision (1) is not supported by "a preponderance of reliable, probative, and substantial evidence," (2) draws conclusions that are directly contrary to established FAA law and policy, and (3) constitutes prejudicial error. [FAA Exhibit 2, Item 2, p. 1]. The County argues that the DD lacks evidence of discrimination by the County because the basis for the County's actions is "the failure and continuing refusal by [Complainants] to comply with applicable federal law and regulations, including, but not limited to, 14 CFR Part 135." The County also argues that the failure of Complainants to comply with critical policies adversely impacts the safe and efficient operations of the airport and constitutes a defense to both a claim of "unjust discrimination" and an "exclusive right." [FAA Exhibit 2, Item 2, pp. 13-14]. As a result, the County requests that the

¹ For the purpose of this decision, Yavapai County, Arizona and Sedona Oak Creek Airport Authority (Appellants) are jointly referred to as the "County." While the Sedona Oak Creek Airport Authority (Authority) has management responsibilities, the County is the actual obligated airport sponsor.

Associate Administrator reverse the Determination or remand the Complaint to the Director. [FAA Exhibit 2, Item 2, p. 3].

Complainants (Appellees) challenge the County's arguments for multiple reasons. Regarding Dakota's lack of an FAA operating certificate under 14 CFR § 135 (Part 135 Certificate), Dakota submits that Solid Edge Aviation (Solid Edge), its affiliate and co-complainant, possesses a Part 135 certificate. Complainants also contend that even without a Part 135 certificate, Complainants are entitled to reasonable access to the Airport, which the County refuses to provide. As a result, the Complainants conclude that the County is violating Grant Assurance 22, Grant Assurance 23, and Grant Assurance 5. [FAA Exhibit 2, Item 3, p. 2]. Complainants request the Associate Administrator to affirm the DD and require the County to submit and implement a Corrective Action Plan (CAP) to correct those violations. [FAA Exhibit 2, Item 3, p. 15].

The Associate Administrator has reexamined the record, including the Director's Determination, its administrative record, the Appeal, and its pleadings, and applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the DD is supported by a preponderance of reliable, probative, and substantial evidence and is consistent with applicable law, precedent, and FAA policy. Therefore, the Associate Administrator affirms the Director's Determination.

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In the July 29, 2021, DD, the Director found that the County has violated Grant Assurance 22, *Economic Nondiscrimination* by failing to provide reasonable accommodations at the Airport for a class of commercial aeronautical activities such as Complainants. The Director also found that the County granted an exclusive right contrary to Grant Assurance 23, *Exclusive Rights* by making a 14 CFR Part 135 certificate a requirement for operators seeking to enter into leases to become air tour operators and excluding other classes of commercial aeronautical users. The Director found that the County's lack of consistency between different classes of commercial aeronautical users is contrary to Grant Assurance 23. Finally, the Director determined that by allowing the Authority, operator of Sedona-Oak Creek Airport, to take the actions it took which resulted in violations of the applicable Federal obligations, the County is also in violation of Grant Assurance 5, *Preserving Rights and Powers*. The Director also determined that the County actions violated the covenants under the two Deeds of Conveyance executed under Section 16 of the Federal Airport Act. [FAA Exhibit 2, Item 1, pp. 12, 15-16].

In the DD, the Director ordered the County to present a CAP within 30 days. In addition, pending the FAA's approval of a CAP, the Director outlined the Federal funding implications related to this action to include withholding approval of any applications submitted by Yavapai County for the Sedona-Oak Creek Airport under 49 U.S.C. § 47114(d) and authorized under 49 U.S.C. § 47115 and the potential withholding of these approvals under 49 U.S.C. § 47106(d). [FAA Exhibit 2, Item 1, p. 17].

III. PARTIES

A. Appellees

Complainants consist of two companies, Dakota Territory Tours (Dakota) and Solid Edge Aviation LLC (Solid Edge). Dakota has operated at the Airport since 1994 and operates at the Airport under a lease and license amended in 2015. Solid Edge Aviation, LLC operates under 14 CFR Part 135, doing business as "Sky Safari Charter" and "Sky Safari." Dakota and Solid Edge have a business relationship. As established in the DD, and for the purpose of this decision, and for clarity purposes, these two companies are referred to collectively as "Complainants" or individually as "Co-Complainants." [FAA Exhibit 2, Item 1, p. 2].

B. Appellant

The Sedona-Oak Creek Airport (Airport) is a public use, general aviation airport owned by Yavapai County, Arizona. The County is the Airport owner and sponsor. The Sedona-Oak Creek Airport Authority (Authority) is the operator of the Airport. The development of the Airport was financed in part with FAA Airport and Improvement Program (AIP) funding, authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* Between 1982 and 2020, the Airport received approximately \$14 million in AIP funding. Thus, the County is obligated to comply with the FAA sponsor grant assurances and related Federal law, 49 U.S.C. § 47101. The United States conveyed the land that constitutes Sedona-Oak Creek Airport to the County under two Deeds of Conveyance executed under Section 16 of the Federal Airport Act. The County is obligated to comply with the covenants included in the Deeds of Conveyance. [FAA Exhibit 1, Item 43 and Item 44].

Although the County is the airport sponsor, the Airport is operated under a Master Lease Agreement with the Authority, a 501(c)(3) non-profit organization. The lease agreement was renewed on February 12, 2003, with terms set to expire on June 30, 2050. The Authority is governed by a Board of Directors, which includes seven members elected for five-year terms with a 10-year term limit. The day-to-day operation of the Airport is overseen by the Authority's general manager, business manager, and six staff members. The Authority also owns and operates the Airport's sole fixed-base operator (FBO), Red Rock Aviation. [FAA Exhibit 2, Item 1, pp. 2-3].

IV. PROCEDURAL HISTORY

1. July 29, 2021 - The *Director's Determination* is issued. [FAA Exhibit 2, Item 1].
2. August 27, 2021 – Respondent filed a *Motion to Suspend Submission of Corrective Action Plan Pending Outcome of Appeal* (Appeal). [FAA Exhibit 2, Item 2].
3. September 15, 2021 – Complainants filed a *Reply Brief in Opposition to Respondents' Appeal of the Director's Determination* (Reply). [FAA Exhibit 2, Item 3].
4. September 22, 2021 – Respondent filed a *Petition Under 14 CFR § 16.33 to Enlarge the Record*. [FAA Exhibit 2, Item 4].

5. September 23, 2021 – Respondents filed a *Brief in Response to Complainants’ Reply*. [FAA Exhibit 2, Item 5].
6. September 24, 2021 – Complainants filed a *Motion to Strike Yavapai County’s Petition to Enlarge Record or Alternatively for 14 Days to Respond to Petition*. [FAA Exhibit 2, Item 9].
7. September 29, 2021 – Complainants file a *Surreply In Support of Director’s Determination*. [FAA Exhibit 2, Item 6].
8. September 29, 2021 – Complainants filed a *Response to County’s September 22, 2021 Petition to Enlarge Record*. [FAA Exhibit 2, Item 7].
9. October 8, 2021 – Respondents filed *Objections to Complainants’ Surreply in Support of Director’s Determination*. [FAA Exhibit 2, Item 8].
10. October 20, 2021 - Complainants filed a *Reply Brief in Opposition to Respondents’ Objections to Complainants’ Surreply in Support of the Director’s Determination*. [FAA Exhibit 2, Item 10].
11. December 2, 2021 - Complainants filed a *Reply In Support Of Request for Order Requiring Compliance with Requirement for a Corrective Action Plan*. [FAA Exhibit 2, Item 11].
12. December 13, 2021 - Respondents filed a *Surreply in Response to Complainants’ Reply in Support of Request for Order Requiring Compliance With Requirement for Corrective Action Plan*. [FAA Exhibit 2, Item 12].
13. December 22, 2021 - Respondent filed a *Motion to Enlarge the Part 16 Administrative Record*. [FAA Exhibit 2, Item 13].
14. December 29, 2021 - Complainants filed a *Response to Respondent Yavapai County’s Motion to Enlarge the Part 16 Administrative Record*. [FAA Exhibit 2, Item 14].
15. February 15, 2021 - Complainants filed a *Motion for Cease and Desist Order*. [FAA Exhibit 2, Item 15].
16. February 17, 2022 - The Director issued an *Order Shortening Time for Response* directing Yavapai County and the Sedona-Oak Creek Airport Authority (Respondents) to submit a response by Friday, February 18, 2022. [FAA Exhibit 2, Item 16].
17. February 18, 2022 - Respondents filed a *Response to Complainants’ Time-Sensitive Renewed Motion for Cease-And-Desist Order*. [FAA Exhibit 2, Item 17].
18. February 19, 2022 - Complainants filed a *Reply Brief In Support of Its Time-Sensitive Renewed Motion for Cease and Desist Order*. [FAA Exhibit 2, Item 18].
19. February 22, 2022 - Respondents filed a Supplemental Citation of Authority. [FAA Exhibit 2, Item 18A].

See Index for other administrative filings.

V. THE APPEALS PROCESS

A party adversely affected by the DD, in cases such as this, must file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination [14 CFR § 16.33(c)]. The review is limited to an examination of the DD and the administrative record upon which such determination was based. The Associate Administrator does not consider new allegations or issues on appeal unless finding good cause as to why the new issue or evidence was not presented to the Director. [14 CFR § 16.33(f)].

On appeal, the Associate Administrator will consider (1) whether the findings of fact are supported by a preponderance of reliable, probative, and substantial evidence contained in the record; (2) whether the conclusions were made in accordance with law, precedent, and policy; and (3) whether there are questions on appeal that are substantial; and (4) whether any prejudicial errors occurred. [14 CFR § 16.33(e)].

VI. PRELIMINARY ISSUES

The County introduced evidence that Dakota Territory Tours, A.A.C. filed for protection in the U.S. bankruptcy court during the pendency of this appeal and that company is no longer operating. The County argues that the complaint is now moot. However, the County continues to argue that it need not accommodate or provide reasonable access to air tour operators who lack a 14 CFR Part 135 certificate, such as Dakota Territory. Additionally, co-complainant Solid Edge appears to be unaffected by Dakota Territory's bankruptcy and continues to seek the relief sought in the complaint, including reasonable access to the airport. Therefore, the Associate Administrator finds the complaint is not moot and will address the primary issues raised on appeal, as discussed below. [FAA Exhibit 2, Items 22-31, and 33-34].

VII. ISSUES ON APPEAL

The Associate Administrator identified the following two issues to be reviewed on Appeal:²

Issue 1 - Whether the Director erred in finding that the County violated Grant Assurance 22, *Economic Nondiscrimination*, or the similar provisions contained in the property conveyance, by denying Complainants a lease to operate on the airport.

Issue 2 - Whether the Director erred in finding that the County violated Grant Assurance 23, *Exclusive Rights* or the similar provisions contained in the property conveyance, by excluding Complainants from the airport.

VIII. ANALYSIS

A. Issue 1 - Whether the Director erred in finding that the County violated Grant Assurance 22, *Economic Nondiscrimination*, or the similar provisions contained in the property conveyance, by denying Complainants a lease to operate on the airport.

² Because the finding in the Director's Determination that the County is in violation of Grant Assurance 5 *Rights and Powers* was not appealed, that issue was not considered on appeal.

1. Appellant's Position

The County argues the Director erred in concluding that the County violated Grant Assurance 22 by denying Complainants a lease at the airport. The County asserts it was justified denying Complainants a lease because Co-Complainant Dakota is not a commercial air tour operator and “possesses no FAA certification for its operations despite the requirements of “14 CFR § 119.5(g); 119.2; 135(a)(1) and § 136.37, and instead operates under a Part 135 certification purportedly applicable exclusively to a separate and distinct entity...Solid Edge Aviation, LLC.” The County asserts that awarding “commercial air tour leases solely to Part 135 operators is entirely proper,” because of “safety and increased FAA oversight of Part 135 operators, as well as the spatial and aeronautical constraints applicable to the airport.” [FAA Exhibit 2, Item 2, pp. 1-2]. The County argues that Co-Complainant Dakota has no 14 CFR Part 135 certification, nor any other certification, that could verify the safety of its operations. The County also discusses 14 CFR Part 91 operations but concludes that “there is no category applicable to [Complainants'] commercial air tour operations that does not require a Part 135 certification.” [FAA Exhibit 2, Item 2, p. 5 and FAA Exhibit 2, Item 5, pp. 2-3].

The County claims its Part 135 certification requirement for commercial service operations constitutes a reasonable restriction upon access to the airport. According to the County, the Director ignored evidence of the physical characteristics of the airport that justify the Part 135 certification restriction. It cites the 2017 Master Plan's statement that “a Part 135 certificated carrier is the only type of for-hire carrier with operational characteristics sufficient to overcome the airport's physical constraints” because the 5,200-foot runway at an elevation of 4,300 feet, “especially in warm weather, inhibits the operation of heavier aircraft, which in the vast majority of cases require a longer runway length.” In other words, the County argues that it met Grant Assurance 22 “by requiring a Part 135 certification of its potential commercial air service providers, and thus refusing to discriminate between entrants under the same operational constraints.” [FAA Exhibit 2, Item 2, p. 8]. The County asserts the Director erred in finding that Complainants' operations are reasonably consistent with the Federal Aviation Regulations (FARs) for commercial air tours when, at the same time, the operations are “in patent violation of one or more of the FARs.” [FAA Exhibit 2, Item 2, pp. 7-8].

The County explains in detail how Complainants (Dakota and Solid Edge) are not in compliance with the FARs and related requirements. For example, the County claims Complainants misstate the requirements of 14 CFR § 91.147 and that “a Part 91 certification requires that the operation must also be “in accordance with §§ 119.1(e)(2), 135.1(a)(5) or 121.1(d).” The County argues that Solid Edge is intentionally violating most, if not all, of the requirements of its Part 135 certification, several sections of Part 119, and specific sections of its Operations Specifications/General Operations Manual itself. Based on these “continuing violations,” the County “had the right, the reason, and the responsibility to deny [Complainants] operational access to the Airport.” Otherwise, the County “would be sanctioning the illegal operation of an operator whose safety has not been verified by the only relevant authority, the Federal Aviation Administration.” [FAA Exhibit 2, Item 8, pp. 2-4].

Concerning the “affiliate” relationship between Dakota and Solid Edge, the County contends that affiliates cannot operate under Solid Edge's FAA Part 135 Certification for several reasons. The Certificate is not transferrable, prohibits transferring responsibility for operational control of aircraft, restricts sharing the certificate holder's authority, and restricts the “doing business as”

(DBA) relationship. The County states that “for argument's sake, [if] Dakota and Solid Edge had some kind of formal relationship, which they do not, Solid Edge has no formal relationship with the airport, i.e., no lessor/lessee relationship, no RFP [Request for Proposals]; submission or approval granting access, not even an insurance policy,” and consequently Co-Complainant “Dakota is the only operator whose Part 135 certification, or lack thereof, is material to the Director's analysis.” [FAA Exhibit 2, Item 2, pp. 6-7].

The County also disagrees with the Director’s findings that there were no problems raised by the FAA’s jurisdictional Flight Standards District Office (FSDO) inspectors concerning Dakota and Solid Edge’s operations or relationship, that there was no noncompliance with any FARs by either entities, or that Dakota and Solid Edge operations and relationship were consistent with the FARs for commercial air tours. The County claims there is no evidence to support the Director’s findings.

The County contends that the Director misapprehended or overlooked facts about Dakota's alleged affiliation with Solid Edge. The County asserts that “Arizona State law precludes two independent legal entities, as in this case, from affiliation through a [DBA], or other mechanism,” and thus “Dakota cannot be construed to be included in any Part 135 certification of the completely independent entity, Solid Edge.” [FAA Exhibit 2, Item 2, pp. 5-6]. The County points out that there is no evidence of that affiliation in the record but rather, the evidence presented “conclusively proves that there is no affiliation or overlapping ownership between the two entities whatsoever,” and that the “previous suggestion by Dakota to the contrary was intentionally misleading.” The County adds that “Solid Edge does not operate at Sedona Airport – or at all, and that “Solid Edge has no operations, airplanes, pilots, employees or revenue.” [FAA Exhibit 2, Item 4, pp. 3-4].

The County also challenges the Director’s finding that "there is no evidence...that the [county] sought to negotiate with [Complainants], or provide [Complainants] any path to become a tenant somewhere at the Airport, after the RFP." The County claims that it “does not have to lean over backward to accommodate a litigious operator like [Complainants],” and that it “attempted to negotiate with [Complainants] numerous times...throughout the seven years of litigation,” but Complainants “arbitrarily and repeatedly failed and refused to comply with FAA regulations, including those governing aircraft certification.” The County adds that despite Complainants’ “failure to comply with the law... [Complainants have] operated continuously and without interruption on the airport.” [FAA Exhibit 2, Item 2, pp. 8-9].

The County claims that the manner in which it dealt with Complainants’ “unauthorized for-hire aircraft operations without an Air Carrier or Operator Certificate,” is “far from acting in a discriminatory, or unjust manner.” The County affirms that it “treat[s] all operators...comparably in support of FAA's mandate for safety and efficiency,” and that “the only discrimination at issue here must be laid at [Complainants’] doorstep as self-inflicted by its refusal to comply with regulations applicable to all others.” The County concludes the “Director has failed to rely on any evidence, let alone reliable and probative, of discrimination in Respondents' actions in dealing with [Complainants], the Director's Determination constitutes prejudicial error that warrants immediate reversal by the Associate Administrator.” [FAA Exhibit 2, Item 2, pp. 9-10].

2. Appellees’ Position

Complainants assert that Dakota has been affiliated with Solid Edge’s Part 135 certificate with the County’s knowledge for years. Complainants explain that Dakota has been operating at the Airport

since 1994 and that the County acknowledged in 2015 that Solid Edge was a “Part 135 Operating Company” of Dakota. Complainants point to the record to show that (1) the County was aware that Dakota and Solid Edge were conducting Part 135 operations prior to 2017, and (2) that the County communicated with the FSDO in 2017 when it questioned the FSDO about the Dakota and Solid Edge certifications and relationship. Complainants state that (1) the record does not indicate the FSDO inspectors had concerns regarding Dakota and Solid Edge operations or relationship, (2) the FAA inspections of Dakota and Solid Edge failed to identify noncompliance with any FARs, and (3) Dakota and Solid Edge operations and relationship were consistent with the FARs for commercial air tours. [FAA Exhibit 2, Item 3, pp. 3-6]. Complainants reject the County’s claim that Dakota “has no legally cognizable relationship with Solid Edge,” and add that “there is ample evidence in the record of the relationship between Dakota and Solid Edge.” Dakota summarizes this by stating that “Complainants are affiliated entities under common ownership and management.” [FAA Exhibit 2, Item 6, p. 2 and FAA Exhibit 2, Item 7, p. 1].

Complainants contend that the FAA had no problem with its safety record, status or operations at the Airport and that the County cannot “assert that there is a safety or regulatory problem associated with Complainants” regarding their Federal authorization to serve the Airport. Complainants argue that “even if Solid Edge’s status as a Part 135 certificate holder is ignored,” Complainants can provide aeronautical services at the Airport as air tour operators under 14 CFR Part 91. [FAA Exhibit 2, Item 3, pp. 6-7]. Complainants point to the FAA Letter of Authorization (LOA) under which Dakota is “authorized to conduct commercial air tour operations under Title 14 Code of Federal Regulations (CFR) Section 91.147.” Complainants’ flights “are within 25 miles of Sedona Airport, which is authorized to occur by 14 CFR 119.1(e)(2) without the necessity of a Part 135 certificate.” Thus, Complainants argue that the County “erroneously assert that Dakota needed certification under §§ 119, 135, or 121 to operate its commercial flights.” Complainants assert that the County is unreasonably denying them access to the Airport. [FAA Exhibit 2, Item 3, pp. 6-7].

Regarding the lease, Complainants assert that the County acted arbitrarily in denying a lease and in only allowing Part 135 operators to enter into leases at the airport. Complainants assert the County did not provide a similar opportunity for leases to other classes of commercial aeronautical activities offering similar services. Complainants challenge the County’s position that it has “no obligation to provide such space” under Grant Assurance 22 and argue the Director correctly found that Complainants were “plainly interested in being a commercial activity tenant at the Airport, before and after the RFP,” and that “there is no evidence...that the [County] sought to negotiate with Complainants, provide Complainants with any path to become a tenant somewhere at the Airport, after the RFP,” but “on the contrary, [the County] began terminating[Complainants’] lease immediately after announcing that Guidance’s [another operator] proposal was selected.” Complainants also point to the Director’s finding that the County unreasonably restricted “access to the Airport to prevent other classes of commercial air tour activities who otherwise meet regulatory requirements,” and “in the absence of special circumstances, denying a commercial operator access, or applying a higher minimum standard, because of a concern about what an operator might do, is not a legitimate exercise of a sponsor’s authority,” and is thus, a violation of Grant Assurance 22. [FAA Exhibit 2, Item 3, pp. 10-11].

3. Associate Administrator's Determination

The County challenges the Director's decision that it violated Grant Assurance 22, *Economic Nondiscrimination*, by denying Dakota access to the airport. Grant Assurance 22 provides two restrictions relevant to this case:

(a) [The airport sponsor] will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses.

* * *

(i) The sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

Under Grant Assurance 22, an airport sponsor cannot unjustly discriminate between types of aeronautical activities. A sponsor may only prohibit a given aeronautical use "if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." [Grant Assurance 22(i)] The authority to prohibit activities under Grant Assurance 22(i) is "limited so as to ensure consistency with FAA safety determinations" and the final decision as to what prohibitions may be necessary at an airport to ensure the safe operations of that airport lies with the FAA. [*City of Santa Monica v. F.A.A.*, 631 F.3d 550, (D.C. Cir. 2011)(invalidating airport sponsor's ban against certain classes of aircraft using the airport based upon alleged safety concerns); *In the Matter of the City of Santa Monica*, 2009 WL 3176873, FAA Docket No. 16-02-08, (July 8, 2009); *Jeff Bodin and Garlic City Skydiving v. County of Santa Clara*, 2013 WL 12244245, FAA Docket No. 16-11-06 (August 12, 2013) (invalidating airport sponsor's ban against skydiving based upon alleged safety concerns)].

The County argues it is justified in not accommodating Complainants because Dakota is not an "approved" commercial air tour operator and does not have a Part 135 Certificate. The County contends that Co-Complainant Dakota (1) is not qualified and does not possess the required certification to conduct air tours for compensation, (2) has refused to obtain a Part 135 or other qualifying certificate, and (3) has repeatedly failed and refused to comply with FAA regulations. The County also challenges Dakota's claimed affiliation with Solid Edge and their ability to jointly operate as affiliates at the airport. The County insists that awarding commercial air tour leases solely to Part 135 operators is proper because of the "safety and increased FAA oversight of Part 135 operators, as well as the spatial and aeronautical constraints applicable to the airport." The County argues there is no way to ensure the safety and efficiency of [Complainants'] operation without 14 CFR Part 135 certification. The County further rejects Complainants' claim they conducted 14 CFR Part 91 operations and adds that there is no category applicable to Complainants' "commercial air tour operations that does not require a Part 135 certification." The County summarizes its actions as a permissible "defense" to the claim of "unjust discrimination."

On appeal, the County provides an analysis of the applicable FARs, including 14 CFR Part 119, Part 135, and Part 91, to explain why Complainants have not, could not, or cannot comply with the FARs. The County details how Dakota's operations are contrary to Solid Edge's Part 135 certificate, including its Operations and Specifications, and how Dakota has been "trading one violation of FAA regulations for another." [FAA Exhibit 2, Item 5, p. 5]. The County concludes

Complainants have been operating in “patent violation of one or more of the FARs,” and the DD is “directly contrary to the express terms of FAA's governing statutes and regulations.”

The Associate Administrator disagrees.³ The County primarily contends on appeal that Complainants should not be allowed to operate at the airport as an air tour operator because they do not possess a valid Part 135 certification. This is the issue the Associate Administrator must review on appeal.

An airport sponsor may not restrict access to an airport based upon whether the sponsor believes a particular aeronautical operator is appropriately certificated by the FAA or complies with 14 CFR Part 91, 119, or 135. [*City of Santa Monica v. F.A.A.*, 631 F.3d 550, (D.C. Cir. 2011)]. An operator’s compliance with certification standards is an FAA (Flight Standards Service) function.⁴ Complainants are aeronautical users and service providers whether they are qualified as a 14 CFR Part 91 operator or as a 14 CFR Part 135 operator, affiliated or not, and therefore, they must be accommodated at the airport. It is true that the FARs have specific provisions for different types of air tour operators. For example, a commercial air tour operator can operate under 14 CFR Part 91 or Part 135. The FAA Flight Standards Service is responsible for development of policy and guidance and enforcement of the FARs for all commercial air tour operations, both Part 91 and Part 135. However, it is the FAA, not the County, who has authority to determine what constitutes a legitimate air tour operator under the regulatory framework, such as 14 CFR Part 91 or Part 135. The County lacks authority to do so. Therefore, the County must accommodate Complainants’ aeronautical operations and do so in a reasonable and non-unjustly discriminatory manner.

Whether a particular air tour operation can be safely conducted at an airport is an FAA regulatory function authorized under Part A of Subtitle VII of the Title 49 of the United States Code (49 U.S.C. §§ 40101 – 46507) and based upon the facts as applied under the applicable FARs. The Associate Administrator reviewed the record and found no evidence that the FAA FSDO, which has regulatory oversight responsibilities over Complainants, determined that 1) Complainants’ operations violated any FARs, 2) the relationship between Dakota and Solid Edge is contrary to the FARs, 3) there are underlying safety issues in the way Complainants conduct operations, 4) there were adverse impacts on the safety and efficiency of the airport, or 5) there were other legitimate reasons that would preclude Complainants from operating as air tour operators. The record substantiates that Complainants can engage in air tour operations at the airport.

The County argues that the Director did not accurately interpret FAA’s regulations and the County’s interpretation should be adopted. This argument is rejected. The FAA interprets its regulations, not the County, and in this case, the FAA FSDO found there were no violations or safety issues presented by Complainants’ operations. Further, the County lacks authority to decide whether an operator meets the applicable FARs affecting air tour operators or any other aeronautical operation. For example, the County cannot choose only to permit 14 CFR Part 141 flights schools and restrict 14 CFR Part 61 flights schools, or only allow aircraft maintenance under 14 CFR Part 145, or only permit 14 CFR

³ The County makes several peripheral or diversionary arguments, such as arguing that Complainants were litigious, that the relationship between Dakota and Solid Edge is unlawful or was misrepresented and that Solid Edge is not a legitimate tenant.

⁴ FAA Flight Standards Service is the responsible federal entity for the certification, surveillance, and certificate management of all air carriers, air operators, airmen, and air agencies in the following Federal Regulations: 14 CFR Parts 43, 61, 65, 91, 125, 133, 135, 137, 141, 142, 145, 147, 183, and other areas. See https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/afx/afg. See also 49 U.S.C., Subtitle VII, Part A (49 U.S.C. §§ 40101 – 46507).

Part 121 and not allow 14 CFR scheduled Part 135 operations based upon its own interpretation of the level of certification constituting a safe operation. In the end, none of the County's arguments justify the denial of air tour operators' access to the airport. Such a denial is both unreasonable and unjustly discriminatory under the airport's Federal obligations.

For the foregoing reasons, the Associate Administrator finds that the Director did not err in determining that County is in violation of Grant Assurance 22, *Economic Nondiscrimination* or the similar provisions contained in the property conveyance, by denying Complainants' access to the airport and facilities when it denied Complainants a lease.

B. Issue 2 - Whether the Director erred in finding that the County violated Grant Assurance 23, *Exclusive Rights* or the similar provisions contained in the property conveyance, by excluding Complainants from the airport.

1. Appellant's Position

The County challenges the Director's finding that it violated Grant Assurance 23, *Exclusive Rights*, by effectively granting Guidance Air Services, LLC (Guidance) and Westwind Aviation, Inc. (Westwind) exclusive rights to operate at the airport. The County argues that because Complainants continue to operate on the airport, other operators, like Guidance, "never became the only helicopter air tour operator tenant on the Airport as the Director concludes." [FAA Exhibit 1, Item 2, p. 2]. The County argues the Director's finding of an exclusive right violation based upon Westwind's operation at the terminal neglected "to recognize that Westwind is "a fixed wing tour operator, held the appropriate certification for commercial air tours (meeting applicable safety standards for fixed-wing operations)," and that "Westwind was moved out of the terminal to separate modular space before [Complainants made their] Complaint." [FAA Exhibit 2, Item 2, p. 2].

Like Issue 1, the County argues that Dakota's "failure to obtain a certification under 14 CFR Part 135" justifies the County's efforts to "replace it with a compliant, safe, and efficient operator" and thus "the relevant exception to the exclusive rights prohibition clearly applies here, where the safety and efficiency, not just of [Complainants and their passengers], but of the whole airport, is at risk because of the absence of Dakota's requisite certification." The County asserts that "it is indisputable that FAA certification is crucial to the determination of safety in aircraft operations," and that the "the absence of such certification...vitiates any exclusive rights claim as falling directly into an exception to the Exclusive Rights Doctrine." [FAA Exhibit 2, Item 2, pp. 12-13]. The County claims that it acted "in accordance with the relevant and recognized exceptions from the exclusive rights prohibition" because "the airport is constrained by lack of usable space." The County then argues that "until [Complainants] vacate [their] position on the airport, there will be no space for an additional operator. [FAA Exhibit 2, Item 2, pp. 2-3].

The County claims that no exclusive rights have been granted because Complainants are operating at the airport. It notes that Complainants have "managed to maintain operations consistently over the past seven years," and therefore, "two helicopter tour operators, [Complainants] and Guidance have been operating on the airport, and will continue to do so, at least until [the County is] able to enforce the Arizona Court of Appeals decision, conclusively adjudging Dakota guilty of "forcible detainer," i.e., improperly occupying space to which it is not entitled." [FAA Exhibit 2, Item 2, pp. 11-12]. Complainants "continues to occupy one of the only remaining areas for helicopter operations on the airport," and that the site that Complainants "still [occupy], albeit currently illegally, [is] the only

developed and available helicopter positions on the airport.” The County also states that it began “the process of developing Requests for Proposals (RFP) to obtain alternative helicopter operators,” so that despite Complainants’ “intransigence in refusing to vacate its current space, Respondents are currently taking all possible steps to eliminate the possibility that an "exclusive right" might come to exist.” [FAA Exhibit 2, Item 2, p. 12].

2. Appellees’ Position

On appeal, Complainants argue that the Director correctly found that the County violated Grant Assurance 23 by granting exclusive rights to Guidance Air with regard to helicopter operations at the Airport, and to Westwind for fixed-wing aircraft operations at the Airport. According to Complainants, the County attempted to evict them from the Airport, refused to lease Airport space, and required payment of “a prohibitively large and unjustly discriminatory landing fee to use the Airport for commercial purposes.” As a result, Complainants argue the County created an impermissible exclusive right by denying similar use of the Airport terminal to conduct its air tour business. [FAA Exhibit 2, Item 3, pp. 12-13].

Complainants also argue that the County’s “pretense of their attempt to exclude [Complainants] from the Airport because of...subjective and unsupported safety concerns cannot prevail in this appeal,” and that “any denial based on safety must be based on reasonable evidence demonstrating that airport safety will be compromised if the applicant or individual is allowed to engage in the proposed aeronautical activity.” Complainants state that “airport sponsors should carefully consider the safety reasons for denying an aeronautical service provider or individual the opportunity to engage in an aeronautical activity if the denial has the possible effect of limiting competition or access,” and that the “FAA is the final authority in determining what, in fact, constitutes a compromise of safety.” Complainants conclude “the airport sponsor uses a safety excuse to try to preclude a competing aeronautical services provider from serving the airport, it cannot do so without FAA substantiation of the alleged, safety problem, which in this case is not present.” [FAA Exhibit 2, Item 3, pp. 12-14].

3. Associate Administrator’s Determination

The Director held that County is violating Grant Assurance 23, *Exclusive Rights* by allowing only one class of aeronautical “air tour” users (Part 135 air charter operators) to be tenant/operators, and excluding other air tour operators without justification, resulting in a single company being the sole tenant helicopter air tour operator at the Airport. The Director found that the County’s lack of consistency between different classes of commercial aeronautical users is contrary to Grant Assurance 23. [FAA Exhibit 2, Item 1, pp. 15-16].

Grant Assurance 23 implements the provisions of title 49 U.S.C. §§ 40103(c) and 47107(a)(4), which provides that “a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport” 49 U.S.C. § 47104(a)(4). The sponsor agrees under Grant Assurance 23(b) that it “will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities... and will terminate any exclusive right to conduct an aeronautical activity now existing at an airport before the grant of any assistance under Title 49, United States Code.”

Like the arguments under Issue 1, the County argues that Complainants' failure to obtain a valid Part 135 certification “fully justifies [the County’s] efforts to replace [Complainants] with a compliant,

safe, and efficient operator.” The County adds that “the relevant exception to the exclusive rights prohibition clearly applies here, where the safety and efficiency, not just of [Complainants and their] passengers, but of the whole airport, is at risk because of the absence of [the] requisite certification.” The County asserts that “it is indisputable that FAA certification is crucial to the determination of safety in aircraft operations,” and that the “the absence of such certification...vitiates any exclusive rights claim as falling directly into an exception to the Exclusive Rights Doctrine.” The County concludes that its actions are a permissible “defense” to the claim of an "exclusive right." [FAA Exhibit 2, Item 2, pp. 12-14].

An airport sponsor’s denial of access to the airport based on safety concerns must be supported by reasonable evidence demonstrating that airport safety will be compromised if the applicant or individual is allowed to engage in the proposed aeronautical activity. [*City of Santa Monica v. F.A.A.*, 631 F3d 550, (D.C. Cir. 2011); *In the Matter of the City of Santa Monica*, 2009 WL 3176873, FAA Docket No. 16-02-08, (July 8, 2009); *Jeff Bodin and Garlic City Skydiving v. County of Santa Clara*, 2013 WL 12244245, FAA Docket No. 16-11-06 (August 12, 2013)]. Again, the FAA, not the airport sponsor, is the final authority in determining what constitutes an acceptable level of safety for aeronautical activity at the airport. As in Issue 1, the Associate Administrator finds no evidence that the FAA FSDO found Complainants’ operations to be in violation of the FARs, that there were safety issues in the way Complainants conducted operations, or that Complainants caused an adverse impact on the safety and efficiency of the airport. No other evidence is presented that substantiates the County’s safety argument. To the contrary, as noted above, the record indicates that Dakota can legally engage in air tour operations, as provided by the applicable FARs.

Therefore, the Associate Administrator rejects the County’s argument that safety concerns justify the County’s decision to exclude Complainants. Consequently, the County’s argument that “the absence of [a Part 135 certificate] ...vitiates any exclusive rights claim as falling directly into an exception to the Exclusive Rights Doctrine,” fails.

The Associate Administrator also rejects the County’s theories that no exclusive rights violation occurred because (1) there are other “legitimate” operators at the airport and (2) Complainants have continued to operate at the airport using the “only developed and available helicopter positions on the airport.” An exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege or right. [*Atlantic Beechcraft Services, Inc. and Southeast Turbine Corp. vs. City of Fort Lauderdale, Florida*, FAA Docket No. 16-17-03, p. 12]. An exclusive right may be conferred by express agreement, imposition of unreasonable standards or requirements, or by another means. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute the granting of an exclusive right. [*Atlantic Beechcraft Services, Inc. and Southeast Turbine Corp. vs. City of Fort Lauderdale, Florida*, FAA Docket No. 16-17-03, p. 8]. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another [*Pompano Beach v. FAA*, 774 F2d 1529, (11th Cir, 1985)]. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or right, would be an exclusive right.

Here, the County imposed a requirement upon Complainants which restricted their operations at the airport while other air tour operators are permitted to operate. The basis for restricting Complainants’

operations from operating is flawed and unjustified. Hence, an exclusive right has been created in favor of the other air tour operators.

The Associate Administrator rejects the County's argument that its actions are justified because there is an "exception from the exclusive rights prohibition" related to a lack of space which can only be cured if "[Complainants vacate their] position on the airport." Removing Complainants from whatever space was occupied does not diminish the County's obligation to reasonably accommodate Complainants somewhere else at the airport. This is especially true, as is the case here, the removal is based on flawed and unjustified arguments. The application of flawed and unjustified arguments or processes do not, and cannot, lead to a permissible exclusive right.

In summary, as long as Complainants' operation is lawful under FAA regulations, as determined by the FAA, be it under Part 91, Part 135, affiliated (e.g., aircraft leases, agreement) or not, incorporated or not, the operation must be reasonably accommodated at the Airport, without unjust discrimination, irrespective of the County's interpretations of the FARs or whether the existing minimum standards cover the proposed activity. Against this background, the Associate Administrator finds that the Director did not err in determining that County is in violation of Grant Assurance 23, *Exclusive Rights* or the similar provisions contained in the property conveyance, by denying Complainants access to the airport and facilities.

IX. CONCLUSIONS AND FINDINGS

The Associate Administrator's role in this Appeal is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination. In arriving at a final decision in this Appeal, the Associate Administrator has reexamined the record, including the DD, its administrative record, the Appeal, the City's Reply, and applicable law and policy. Based on this reexamination, this decision concludes that the DD is supported by a preponderance of reliable, probative, and substantial evidence and is consistent with applicable law, precedent, and FAA policy. The DD is affirmed, including the CAP as amended. This decision constitutes a final decision of the Associate Administrator pursuant to 14 CFR § 16.33.

The Associate Administrator notes that as part of these proceedings, the County has not attempted any level of compliance by engaging in the CAP process as called for in the DD despite asking for additional time to do just that. Instead, the County has permitted its agent, the Sedona-Oak Creek Airport Authority, to proceed with imposing and pursuing its position that Complainants can be restricted from operating at the Airport.

The Associate Administrator notes that the fact that an RFP process was or is used to select certain operators to use leased airport property does not absolve the County from having to comply with its broader Federal obligations on airport access. An RFP is not a requirement for airport access. Similarly, not all operations require a lease for reasonable airport access. There might be differences in terms and conditions applying to certain operators because of an RFP, whether a lease is entered into or not, and other factors, these processes cannot be used to exclude others from some level of airport access on reasonable terms, without unjust discrimination and without granting an exclusive right. On this alone, the County must provide Complainant access to the Airport. Consequently, the County must adjust its and any applicable requirements to be compliant with the federal obligations to provide reasonable, not unjustly discriminatory access, and without grant an exclusive right to all types of air tours operators that can legally, under the applicable FARs, and as determined by the

FAA, operate at the Airport, now or in the future. The County must develop a CAP that permits Complainants, including Solid Edge, or other similar operators, to operate either as a Part 135, with or without affiliation, or as a Part 91 operator, and to do in a manner consistent with the applicable federal obligations as discussed in this determination.

X. ORDER

ACCORDINGLY, it is hereby ORDERED that:

- (1) The Director's Determination is affirmed and the Appeal is dismissed pursuant to 14 CFR § 16.33.
- (2) Yavapai County shall present a corrective action plan (CAP) within 30 days from the date of this Order. The plan shall explain in detail how it intends to return the Airport to compliance with its Federal obligations concerning the elimination of exclusive rights, access on reasonable terms and conditions without unjust discrimination, and preserving its rights and powers.
- (3) Pending the FAA's approval of a CAP, the FAA will withhold approval of any applications submitted by Yavapai County for the Sedona-Oak Creek Airport for amounts apportioned under 49 U.S.C. § 47114(d) and authorized under 49 U.S.C. § 47115. The FAA is authorized to withhold these approvals under 49 U.S.C. § 47106(d).
- (4) Further FAA action, as provided under the two Deeds of Conveyance executed under Section 16 of the Federal Airport Act, may be considered.
- (5) All Motions not specifically granted in this Order are denied.

RIGHT OF APPEAL

The parties are offered the opportunity to appeal the agency's final decision in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business.

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. [Title 14 CFR § 16.247(a).]

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Shannetta R. Griffin, P.E.
Associate Administrator for Airports
Federal Aviation Administration

Date